NO. 100466-4

IN THE SUPREME COURT OF WASHINGTON

PREFERRED CONTRACTORS INSURANCE COMPANY, RISK RETENTION GROUP, LLC,

Plaintiff,

vs.

BAKER AND SON CONSTRUCTION, INC., a Washington for-profit corporation; ANGELA COX, as Personal Representative of the Estate of RONNIE E. COX, deceased; ANGELA COX, individually and as mother of G.C., a minor,

Defendants

BRIEF OF PLAINTIFF PREFERRED CONTRACTORS INSURANCE COMPANY

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I. CERTIFIED QUESTION

A. Question Certified

Whether a liability insurance policy providing only coverage for "occurrences" and resulting "claims made and reported" that take place within the same one-year policy period, and providing no prospective or retroactive coverage, violates Washington public policy and renders either the "occurrence" or "claims-made and reported" requirement unenforceable.

B. Answer to Certified Question

No. The language in the insurance policies was bargained for by the insured, Baker & Son Construction, Inc. ("Baker"), and there is no public policy basis or other justification for arbitrarily re-writing the insurance policies to create coverage that Baker did not purchase and PCIC did not agree to provide.

II. STATEMENT OF THE CASE

Preferred Contractors Insurance Company, RRG LLC ("PCIC") is a liability insurer[1] that issued two relevant consecutive policies (the "Policies") to defendant Baker. The first policy, PCA5026-PCCM295828, was in place from January 5, 2019 to January 5, 2020 (the "2019 Policy") (Dkt. 24-5). The second policy, PCA5026-PCCM339576, was in place from January 5, 2020 to January 5, 2021 (the "2020 Policy") (Dkt. 24-6.). The "per occurrence" liability limit for both Policies was $1,000,000 while the annual premium for both policies was only $1,132.22. The claims at issue arise out of an October 31, 2019 construction site accident and the subsequent death of Ronnie Cox (the "Decedent" or "Mr. Cox"), the general contractor at the jobsite. PCIC is currently defending Baker in a lawsuit brought by Angela Cox

[1] More specifically, PCIC is a risk-retention group governed by the federal Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 ("LRRA"), and issues policies of liability insurance within the State of Washington.

(the "Underlying Plaintiff" or "Ms. Cox"), the Decedent and the personal representative of the Decedent's estate.

There is no meaningful dispute regarding the timing of the relevant "occurrence" and the timeframe in which the claim was "made and reported" to PCIC. As indicated above, it is undisputed that the accident giving rise to this claim — *i.e.* the "occurrence" at issue — took place during the 2019 Policy, while the first time that a claim was "made and reported" was during the 2020 Policy, when the Underlying Plaintiff's counsel sent a September 23, 2020 letter to Baker, and Baker, in turn, sent that letter to PCIC on September 25, 2020. (Dkt. 24-1.) This was nearly 11 months after the initial "occurrence" or accident.[2]

After receiving notice of the Underlying Plaintiff's claim in late 2020 and conducting an investigation of the claim, PCIC

[2] The Policies also contain an extended reporting period for claims which occur near the end of an applicable policy period. Regardless, for purposes of this action, it is undisputed that the claim was not timely reported during the same policy period that the "occurrence" took place.

concluded that there was no coverage for the accident based on the Policies' requirement that "occurrences" and "claims made and reported" take place within the same policy period, and because certain coverage exclusions applied. (Dkt. 24-2.) After PCIC's initial claim denial, Ms. Cox brought suit against Baker in Pacific County Superior Court on November 12, 2020 (the "Underlying Lawsuit"). (Dkt. 24-3.) PCIC agreed to provide Baker with a defense for the Underlying Lawsuit under a reservation of rights, and brought the instant lawsuit to determine whether PCIC in fact had a duty to defend Baker. (Dkt. 24-4.)

The Underlying Plaintiff's complaint (the "Underlying Complaint") asserts that the Decedent was the owner of Cox Construction and that Cox Construction contracted to remodel the Roadway Motel in Long Beach, Washington. (Dkt 25-3 at ¶ 2.) It is alleged that the job included installing cedar shingle siding and new railings. (*Id.*) The complaint states that

"Ronnie [the Decedent] and his company were the general contractor for the job." (*Id.*)

The Underlying Complaint indicates that Baker was retained as a subcontractor by Cox Construction for the remodeling project. (*Id.* at ¶ 3.) The Underlying Complaint further alleges that on October 31, 2019, one of Baker's employees, Shane Reddick, was working on the jobsite and taking a railing apart, when his actions "caused a 2x4 to come loose and strike the [Decedent] in the side of the head." (*Id.* at ¶ 6.) The Decedent allegedly died in his sleep that night from a brain hemorrhage caused by the impact. (*Id.* at ¶ 6.) The Complaint seeks damages from Baker for wrongful death, negligence, and gross negligence. (*Id.* at 3-5.) Consistent with the procedure encouraged by Washington case law, PCIC agreed to provide a defense to Baker under a reservation of rights and filed this action for declaratory relief against Baker and the Underlying Plaintiff, seeking a determination that PCIC

has no duty to defend or indemnify Baker for the claims in the Underlying Lawsuit.

Except for the different effective dates, PCIC's Policies are the same in all relevant respects and contain identical terms, conditions, limitations, and exclusions. As indicated above, the "per occurrence" liability limit for both Policies was $1,000,000 while the annual premium for both policies was only $1,132.22. Among other things, both policies contain a coverage grant relating to claims for "bodily injury" and "property damage" (as defined) and provide that PCIC has a duty to defend certain covered allegations. Specifically, the Policies' Coverage A Insuring Agreements provide as follows:

> SECTION I – COVERAGES COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as "damages" for "bodily injury" or "property damage" to which this insurance applies.
>
> *..*..*

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that first takes place or begins during the "policy period". An "occurrence" is deemed to first take place or begin on the date that the conduct, act or omission, process, condition(s) or circumstance(s) alleged to be the cause of the "bodily injury" or "property damage" first began, first existed, was first committed, or was first set in motion, even though the "occurrence" causing such "bodily injury" or "property damage" may be continuous or repeated exposure to substantially the same general harm;
>
> (2) The "bodily injury" or "property damage" resulting from the "occurrence" first takes place, begins, appears and is first identified during the "policy period". All "bodily injury" or "property damage" shall be deemed to first take place or begin on the date when the "bodily injury" or "property damage" is or is alleged to first become known to any person, in whole or in part, even though the location(s), nature and/or extent of such damage or injury may change and even though the damage or injury may be continuous, progressive, latent, cumulative, changing or evolving;
>
> *..*..*

The Policies also contain an identical endorsement which modifies the Policies' insuring agreements' coverage grant to

add the aforementioned "claims-made and reported" condition, and specifically provides as follows:

> ENDORSEMENTS
>
> ENDORSEMENT TO POLICY NO. 91
>
> THISENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. PREFERRED CONTRACTORS INSURANCE COMPANY RISK RETENTION GROUP, LLC COMMERCIAL GENERAL LIABILITY POLICY CLAIMS-MADE LIMITATION
>
> THIS ENDORSEMENT PROVIDES COVERAGE ON A CLAIMS-MADE BASIS. READ THE POLICY AND THIS ENDORSEMENT CAREFULLY TO DETERMINE RIGHTS, DUTIES AND WHAT IS AND IS NOT COVERED.
>
> To the extent that any provision of the policy conflicts or varies from this Endorsement, the terms, conditions, and provisions set forth in this Endorsement shall control, govern, and supersede the conflicting or varying provision(s) of the policy.
>
> It is a condition of this endorsement, that this policy does not provide continuous coverage for any insured. A renewal policy may be issued, but each policy will be deemed to stand alone as a single policy, affording no continuous coverage. Accordingly, the claims-made limitation shall only apply as amended below.

It is agreed that this policy is amended as follows:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1 Insuring Agreement

The following Insuring Agreement, c. is added:

c. This policy shall apply only to claims first made against the Insured and reported to the Company during the policy period. Coverage under this Insuring Agreement will only apply to claims made on or after the policy inception date and prior to the policy expiration date as shown on the Declarations page(s), subject to the extended reporting period provided below. If prior to the effective date of this policy, any Insured had a reasonable basis to believe a claim may arise, then neither this endorsement nor the policy shall apply to such claim or related claim.

As a condition precedent to any coverage under this Policy, You shall give written notice to the Company of any claim as soon as practicable, but in all events no later than:

(a) the end of the Policy Period; or

(b) 60 days after the end of the Policy Period so long as such "Claim" is made within the last 60 days of such Policy Period.

....*

As indicated above, PCIC filed a declaratory judgment action in the United States District Court against Baker and the Underlying Plaintiff (collectively, the "Defendants") seeking a declaration that it had no further duty to provide a defense or indemnity for the claims in the Underlying Lawsuit. (Dkt. 1.) PCIC thereafter moved for summary judgment on its claim for declaratory relief. (Dkt. 23.) The District Court held that coverage was precluded because the "occurrence" and "claims-made and reported" conditions were not satisfied, but certified a question to this Court as to whether the timing limitation in the PCIC Policies violates the public policy of the State of Washington. (Dkt. 57.)

III. ARGUMENT

A. THE WASHINGTON LEGISLATURE HAS PLAINLY AND UNAMBIGUOUSLY EXPRESSED THAT THE PUBLIC POLICY OF THE STATE IS THAT INSURANCE POLICIES SHOULD BE CONSTRUED ACCORDING TO "THE ENTIRETY OF THEIR TERMS AND CONDITIONS AS SET FORTH IN THE POLICY[.]"

The starting point of any inquiry into the construction of insurance policies is the fundamental public policy that insurance policies are to be construed according to their terms. Pursuant to RCW § 48.18.520, "[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." The claims-made and occurrence provisions of the PCIC policies are not an exception to this principle.

B. THE POLICIES' TIMING LIMITATIONS ARE ANALOGOUS TO RETROACTIVE DATE LIMITATIONS IN CLAIMS-MADE POLICIES AND HAVE ALREADY BEEN UPHELD BY WASHINGTON COURTS

Claims-made policies regularly employ timing limitations in the form of a retroactive date, which limits coverage for occurrences that occur after a specified date and, by extension, excludes coverage for occurrences that occur before that date. *See* 4Pt2 Bruner & O'Connor Construction Law § 11:526. As noted by Bruner & O'Connor in their treatise:

> The retroactive date usually coincides with the date of inception of the claims-made policy. *Id.* The effect of a retroactive date is to limit coverage to only those losses due to occurrences which take place after the retroactive date. *Id.* The result is that coverage is excluded for claims resulting from occurrences which occurred prior to the inception of the claims-made policy. *Id.* Thus, if an occurrence happens before the retroactive date, even though a claim is brought during the policy period, the claims-made policy will not apply.

Id. Courts in this state have regularly considered and affirmed the applicability of retroactive dates in claims-made policies.

See MSO Wash., Inc. v. RSUI Grp., Inc., No. C12-6090 RJB, 2013 U.S. Dist. LEXIS 65957, at *20 (W.D. Wash. May 8, 2013) ("The retroactive date for the 2009-2010 and 2010-2011 policies is February 2, 2009. Because the claim arose prior to this retroactive date, there is no duty to defend or indemnify under these subsequent policies."); *Envitech, Ltd. Liab. Co. v. Everest Indem. Ins. Co.*, No. C17-6053RBL, 2018 U.S. Dist. LEXIS 136021, at *7 (W.D. Wash. Aug. 10, 2018) ("Envitech completed the Assessment no later than August 29, 2007 — approximately eight months before the Retroactive Date. Because K&S's claims are the result of a professional services incident that took place before the Retroactive Date, the Everest Policies do not provide coverage by their terms, as a matter of law.").

The Defendants' arguments are predicated on a misapprehension of the insurance market and the incorrect assumption that there are pure "occurrence" policies on the one hand and pure "claims-made" policies on the other, with the

latter providing coverage when a claim against the insured is first made during the policy period, regardless of when the liability-creating event took place. As explained above, this is inaccurate. Claims-made policies regularly contain retroactive timing limitations which preclude coverage for occurrences or liability-causing events before a certain date.

By their plain language, each of the PCIC Policies effectively have a retroactive date that is the same as their inception date and expressly exclude coverage for prior acts or retroactive coverage. The Policies unambiguously state that they do not provide continuous coverage over multiple policy periods. These Policies do not present some type of unusual dilemma or complexity for this Court to consider and interpret. The Court of Appeals dealt with such a policy in *State v. Zurich Specialties' London Ltd.*, 116 Wn. App. 1033 (2003) (unpublished), where the policy was described as follows:

> The policy at issue is a 'claims-made' policy. As such, its coverage is triggered by the filing of a claim rather than the occurrence of the injury or

> property damage for which coverage is sought. *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 679, n. 12, 15 P.3d 115 (2000). Under this policy, both the claim and the loss must occur within the policy period. There is no question in this case that David filed her claim within the policy period. The question before us is whether she also sustained a 'loss' within the policy period.

Similarly, in *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 528, 91 P.3d 864, 873 (2004), this Court dealt with a policy containing a coverage grant stating

> This Policy applies only to CLAIMS that are first made against the INSURED and reported to the Company during the POLICY PERIOD, and that arise out of a MEDICAL INCIDENT or EVENT happening on or after the RETROACTIVE DATE.

Steen, 151 Wn.2d 512, 528, n.2, 91 P.3d 864, 873 (2004).

Put simply, the "occurrence" language in the PCIC Policies effectively accomplishes the same result as customary "retroactive date" language like that considered and discussed in the aforementioned cases. The purpose of such language is obvious; the timing limitation maximizes predictability and underwriting efficiency, and thus maximizes the affordability of

the policy. The insurer does not need to investigate and charge for risks associated with the insured's past actions because the exposure is limited to events that take place and are reported during the policy period. Thus, the insurer can "close the book" on the policy once the policy period ends and does not need to charge a premium for the risk that an event during the policy period will require the insurer to perform under the policy years or even decades later. While this language necessarily limits coverage, these features were key to PCIC agreeing to provide Baker with $1,000,000 in "per occurrence" liability coverage while only charging a uniform annual premium of $1,132.22 for both policies.

C. IT IS INAPPROPRIATE TO INVOKE PUBLIC POLICY AS A BASIS TO CREATE COVERAGE WHERE THE PLAIN LANGUAGE OF THE POLICY WOULD NOT AFFORD IT.

Washington courts do not invoke generic public policy considerations when resolving insurance coverage disputes. As this Court has previously explained:

> It is important to note the absence of public policy in the construction of insurance contracts. While this case implicitly presents a grave question of policy, namely who should bear the cost of polluting our environment, the task presently before this court only requires us to construe the terms of the policies under Washington law. Washington courts rarely invoke public policy to override express terms of an insurance policy.

Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 876 n.1, 784 P.2d 507 (1990). Washington courts have held that public policy is generally to be determined from acts of the legislature affecting insurance contracts:

> Although Washington courts will not enforce limitations in insurance contracts which are contrary to public policy and statute, insurers are otherwise free to limit their contractual liability. This court has occasionally questioned the wisdom of certain exclusion clauses, but it has rarely invoked public policy to limit or void express terms in an insurance contract even when those terms seem unnecessary or harsh in their effect.
>
> Public policy is generally determined by the Legislature and established through statutory provisions. The proper starting place for determining public policy, then, is applicable legislation. Neither party has cited a statute specifically addressing the narrow subject of insurance contracts and exclusions for actions of insane persons. Indeed, none apparently exist.

Cary v. Allstate Ins. Co., 130 Wn.2d 335, 339–40, 922 P.2d 1335, 1338 (1996). In its simplest terms, this Court stated "[w]e will not make public policy from whole cloth." *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 663, 999 P.2d 29 (2000).

The Defendants make the absurd argument that RCW 18.27.050, which is part of the general business regulations found in Title 18, and requires that contractors operating in the State of Washington procure and maintain certain liability insurance — dictates an after-the-fact judicial re-write of the expressed terms of the PCIC Policies. However, RCW 18.27.050 is part of a series of statutes governing contractor licensing, bonding and insurance, and squarely places a duty on *contractors* to "furnish insurance or financial responsibility in the form of an assigned account in the amount of fifty thousand dollars for injury or damages to property, and one hundred thousand dollars for injury or damage including

death to any one person[.]"[3] Nothing in the statute implies or suggest that the legislature intended for RCW 18.27.050 to regulate the language of insurance contracts,[4] or to contravene that clear legislative mandate that insurance policies should be construed "according to the entirety of [their] terms and conditions as set forth in the policy." *See* RCW § 48.18.520.

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[3] The certified question does not ask the Court to fashion or suggest a remedy. But if coverage that otherwise does not exist is created on the basis of RCW 18.27.050, it would be limited to the $100,000 required by the statute.

[4] Further, there is nothing in Section 18.27.050 which suggests it was intended to protect the Decedent. The public policy goal of RCW 18.27.050 is to protect the general public rather than those in privity with the contractor. *Harman v. Pierce Cty. Bldg. Dep't*, 106 Wn.2d 32, 37, 720 P.2d 433, 435 (1986). As this Court explained in *Harman*, "[s]ection .050 is designed to protect those <u>*not*</u> in privity with the contractor who might be harmed by his operations." *Harman*, 106 Wn.2d at 37, 720 P.2d at 435 (emphasis supplied). It is undisputed that the Decedent was the general contractor on the jobsite and that the Decedent's company was in contractual privity with Baker. As the principal of the general contractor on the worksite, the Decedent would necessarily have had substantial control over the contractual terms for retaining subcontractors, including any insurance requirements. There is also nothing in the record to suggest that the Decedent or his company took issue with the PCIC Policies before this incident. Plainly, RCW 18.27.140 and RCW 18.28.050 were not intended to address factual scenarios like the one presented by this case.

Courts considering this issue have already considered and expressly rejected attempts to construe RCW 18.27.050 (or similarly worded statutes) as part of a broader legislative effort to regulate the terms of insurance contracts[5] or the insurance market generally. One federal court has held that the statute does not require a broker selling policies to a contractor to refrain from selling claims-made policies, observing:

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[5] As indicated above, PCIC is a risk-retention group governed by the LRRA, 15 U.S.C. § 3901 and, as such, the LRRA preempts most state laws, including state laws governing the contractual relationship between PCIC and its insured. *See Preferred Contractors Ins. Co. Risk Retention Grp. v. Roderick Carswell & Eazy Constr.*, No. 0:16-62873-CIV-DIMITROULEAS, 2020 U.S. Dist. LEXIS 254167, at *7 (S.D. Fla. Apr. 13, 2020) ("The LRRA contains 'sweeping preemption language'" which preempts most state law, other than that of the risk retention group's domicile."); *see also*, 15 U.S.C. § 3902 ("[A] risk retention group is exempt from any State law, rule, regulation or order to the extent that such law, rule, regulation or order would . . . make unlawful, or regulate, directly or indirectly, the operation of a risk retention group[.]"); *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 162 A.D.3d 7, 12, 76 N.Y.S.3d 528, 532 (N.Y. App. Div. 2018) (Noting congressional intent to exempt risk retention groups from state laws and regulations that would compel them to tailor their policies to each state).

> RCW 18.27.050 does not impose a duty on Lockton to sell only occurrence-based insurance policies. It contains no requirements about the type of insurance a contractor must obtain, other than to require that such insurance cover injury, including death, or damages to property up to a specified amount. RCW 18.27.050. Nor does the statute require those who sell insurance to contractors to sell only occurrence-based insurance policies.

HB Dev., LLC v. W. Pac. Mut. Ins., 86 F. Supp. 3d 1164, 1182 (E.D. Wash. 2015). Similarly, the Court of Appeals held, when considering the insurance and financial responsibility requirements for escrow agents under RCW 18.44.201, that the "thrust of the act [was] not to mandate that insurers provide a particular kind of coverage" and that "[c]aims made policies in general do not violate public policy." *Safeco Title Ins. Co. v. Gannon*, 54 Wn. App. 330, 340-41, 774 P.2d 30 (1989). Indeed, if Defendants' argument is accepted, it would lead to the absurd result that *any* legislative requirement that

businesses or professions in Washington maintain insurance[6] justifies an *ad hoc*, after-the-fact, re-write of insurance policies to create coverage, regardless of the policies' stated terms, conditions, limitations, and exclusions. This would plainly thwart the legislature's stated policy that the plain terms of an insurance policy govern the available coverage, and would substantially alter the bargained-for risks borne by liability insurers when they decide to issue an insurance policy.

Put simply, when the legislature wants to steer away from the clear principle that insurance policies should simply be construed according to the "entirety of [the] terms and conditions as set forth in the policy" and the legislature wants to

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[6] Notably, Title 18 RCW contains insurance requirements for many other businesses and professions that are substantially similar to the statute applicable to contractors. These provisions simply require "liability" or "public liability insurance" in a stated amount. *See generally* RCW 18.16.175 (salons); RCW 18.165.100 (private investigators) RCW 18.106.420 (plumbers). Defendants do not attempt to articulate any principle that would preclude a judicial re-write of all policies issued to professions or businesses within Title 18's purview.

dictate the terms of an insurance contract, the legislature does it expressly. For example, both the extent of coverage and the allowable grounds for denying an automobile personal injury protection (PIP) coverage are dictated by statute and regulation. *See* RCW 48.22.085-100; WAC 284-30-395. Further, there are rational public policy reasons for the legislature to *allow* flexibility in policy terms, including allowing contractors to obtain coverage that is affordable and specifically tailored to their specific business needs. Regardless, if the legislature deemed it necessary to dictate the language of liability policies issued to contractors, it could do so; it did not.

Here, there is no public policy basis or other justification for ignoring the plain language of PCIC's Policies or for arbitrarily re-writing these Policies to create coverage that Baker did not purchase and PCIC did not agree to provide. Notwithstanding the Defendants' desire to effectuate an after-the-fact re-write of the Policies to afford coverage for *this*

claim,[7] doing so would require this Court to "make public policy from whole cloth" and would materially alter the bargained-for risk covered under the Policies. There is no basis for such a re-write of the Policies.

[7] The crux of the Defendants' argument is that the coverage provided by the Policies is just too narrow; however, the Defendants' proposed revisions provide no firm public policy framework for how the Policies should be re-written and would simply leave insurers and policyholders to guess at what policy language will be enforced. Notably, the Defendants do not even attempt to articulate a principled way to re-write the Policies to effectuate the perceived public policy goals, but simply urge this Court to re-write the Policies to ensure Coverage Applies for *this* claim. By way of example, Cox proposes that the Court rewrite the 2019 Policy to eliminate the "claims made and reported" language or rewrite the 2020 Policy to eliminate the requirement that any "occurrence" take place within the policy period. *See* Cox's Opening Brief at 39-40. However, if the Court did the opposite — eliminating the "occurrence" timing limitation from the 2019 Policy and the "claims made and reported" limitation from the 2020 Policy — such a change would presumptively be just as valid under Cox's framework, but there would still be no coverage under the Policies. Washington courts consistently recognize the validity of bargained-for coverage limitations which are material to the insurer's risk. *See Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 206, 643 P.2d 441, 443 (1982).

D. WASHINGTON DOES NOT EMPLOY THE DOCTRINE OF REASONABLE EXPECTATIONS IN INTERPRETING INSURANCE CONTRACTS.

The Defendants can point to no Washington statute or case law prohibiting the combination of claims-made and occurrence features in the manner found in the PCIC Policies.[8] In addition to the clear statutory authority set forth in RCW § 48.18.520, courts in Washington are legion in their holding that insurance policies are to be construed as contracts and considered as a whole, with the policy language given a fair, reasonable, and sensible construction, so as to give effect to all of the contract's provisions. *See Kut Suen Lui v. Essex*

[8] Courts of this state recognize that an insurer's increased risk is a material factor in assessing the validity of a policy exclusion, as the insurer's decision to provide insurance and the calculation of premiums is directly connected to the assumed risk. *See Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 668, 999 P.2d 29 (2000) ("[T]he activities excluded constitute an increased risk to the insurer, coverage for which would justify an increase in insurance premium."). Unlike *Mendoza*, where the exclusion in question had no discernible impact on the insurer's risk, the effective period of coverage under the PCIC Policies directly affects the risk undertaken by PCIC and an increased period of coverage would justify a substantially higher premium.

Ins. Co., 185 Wn.2d 703, 710, 375 P.3d 596, 599 (2016) (finding that coverage for water damage was excluded by the plain language of the applicable policy). There is no reason for this Court to adopt or apply a different standard in interpreting or construing the PCIC Policies.

Although the State of Washington has expressly rejected the doctrine of reasonable expectations as a basis to interpret and construe policies of insurance, the Defendants make the spurious argument that this Court should rely on a New Jersey case, *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 340-41, 495 A.2d 406 (1985), which employed the "reasonable expectations" doctrine to invalidate an insurance policy containing both "occurrence" and "claims-made" language. Pointing to the "reasonable expectations" of the insured, the *Sparks* court, took a broad role in policing the terms of insurance contracts due to the absence of New Jersey legislation on point. *Sparks*, 100 N.J. at 339, 495 A.2d at 414. The public policy identified by the *Sparks* court was not a specific

legislative enactment, but rather the court's own conclusion that "[t]o enforce policies that provide such unrealistically narrow coverage to professionals, and, derivatively, to the public they serve, would in our view cause the kind of broad injury to the public at large contemplated by the doctrine that precludes the enforcement of contracts that violate public policy." *Sparks*, 100 N.J. at 340–41, 495 A.2d at 415.

This Court has already rejected the approach the New Jersey court took in *Sparks*. This Court has held that "[t]he 'reasonable expectation' doctrine has never been adopted in Washington[.]" *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116, 121 (1996). And, as set forth above, this Court does not make up public policy out of "whole cloth" to invalidate the terms of insurance contracts as the *Sparks* court did.

Other courts have also rejected the *Sparks* rationale because, like Washington, their jurisprudence does not include an open-ended "reasonable expectations" doctrine. *See Gen.*

Ins. Co. of Am. v. Robert B. McManus, Inc., 272 Ill. App. 3d 510, 515, 650 N.E.2d 1080, 1084 (Ill. App. Ct. 1995) ("[*Sparks*] reflected an objective 'reasonable expectations' test that has been rejected by the courts of this state."); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 791 (7th Cir. 1992) (describing *Sparks* as "very much a minority view"); *Merrill & Seeley, Inc. v. Admiral Ins. Co.*, 225 Cal. App. 3d 624, 630, 275 Cal. Rptr. 280, 283 (Cal. Ct. App. 1990) (rejecting applicability of *Sparks* under California's narrow reasonable expectations doctrine). Washington's outright rejection of the reasonable expectations doctrine precludes reliance on *Sparks* as even persuasive authority.

There is clear statutory authority and prior jurisprudence in this state holding that insurance policies are to be construed as contracts and considered as a whole, with the policy language given a fair, reasonable, and sensible construction, so as to give effect to all of the contract's provisions. Defendants urge this Court to abandon clear statutory authority and prior

precedent in order to re-write the Policies and create coverage where none exists. The weight of authority in this state compels this Court to apply the policy language as written.

IV. CONCLUSION

Because there is no basis for enlarging the scope of the bargained-for promises in the PCIC policy, PCIC respectfully requests that this Court answer the certified question in the negative.

Pursuant to RAP 18.17(c), I certify that this document contains 4,988 words, excluding the title sheet, the table of contents, the table of authorities, the certificate of service, and signature blocks.

RESPECTFULLY SUBMITTED this 9th day of February, 2022.

BETTS, PATTERSON & MINES, P.S.

By:_____
Daniel L. Syhre, WSBA #34158

Attorney for Plaintiff Preferred Contractors Insurance Company

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on February 9, 2022, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief Of Plaintiff Preferred Contractors Insurance Company; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of February, 2022.

Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

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